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15
16 UNITED STATES DISTRICT COURT
17 SOUTHERN DISTRICT OF CALIFORNIA

18 THE LARYNGEAL MASK COMPANY
19 LTD. and LMA NORTH AMERICA,
20 INC.,

21 Plaintiffs,

22 v.

23 AMBU A/S, AMBU INC., AMBU LTD.,
24 and AMBU SDN. BHD.,

25 Defendants.

26 Case No. 3:07-CV-1988 DMS (NLS)

27 **DEFENDANTS' EX PARTE
APPLICATION FOR ORDER
SHORTENING TIME FOR BRIEFING
AND HEARING ON DEFENDANTS'
MOTION TO COMPEL**

28 **Magistrate Judge Nita L. Stormes**

29 **AND RELATED COUNTERCLAIMS**

30 Pursuant to Civil L.R. 7.1.e.5, defendants and counterclaimants Ambu A/S, Ambu Inc.,
31 Ambu Ltd., and Ambu Sdn. Bhd. (collectively "Ambu"), hereby respectfully apply for an order
32 shortening the time on the briefing and hearing schedule for a Motion to Compel Deposition of
33 The Laryngeal Mask Company Ltd. and LMA North America, Inc. (collectively "LMA")
34 Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure ("Motion to Compel").

35 The Notice of Deposition of The Laryngeal Mask Company Ltd. and LMA North
36 America, Inc. Pursuant to Rule 30(b)(6) ("Notice of 30(b)(6) Deposition of LMA") at issue here
37 is directed to claim-construction related topics. See Decl. of Ryan Marton in Supp. of Defs.' Ex

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1 Parte Application for Order Shortening Time (hereinafter “Marton Decl.”), ¶ 2, Ex. A. Ambu
2 served this Notice on October 7, 2008, setting the deposition for November 3, 2008 in order to
3 obtain claim construction related discovery in advance of the November 7, 2008, cutoff for claim
4 construction discovery, and well in advance of the date for filing opening claim construction
5 briefs – November 25, 2008. *See* June 12, 2008, Scheduling Order Regulating Discovery and
6 Other Pretrial Proceedings in Patent Case (Dkt. No. 58) ¶¶ 8-9.

7 In an October 15, 2008 letter from LMA’s counsel to Ambu’s counsel, LMA stated its
8 objections to the Ambu’s Notice of 30(b)(6) Deposition of LMA. *Id.*, ¶ 3, Ex. B. Ambu
9 responded, by and through its counsel, Mr. Ryan J. Marton, in an October 17, 2008 letter
10 indicating Ambu’s intention to proceed with the deposition and requesting that LMA identify its
11 witness. *Id.*, ¶ 4, Ex. C. LMA did not identify a witness, or otherwise respond until nearly a
12 week before the noticed deposition, and only to maintain its objection and request a meet and
13 confer. *Id.*, ¶ 5. The parties met and conferred on October 28, 2008, during which LMA
14 confirmed its refusal to produce a witness to testify as to any of the claim construction topics in
15 the Notice of 30(b)(6) Deposition of LMA, and instead indicated its intention to move for a
16 protective order. Marton Decl., ¶ 6. LMA proceeded to contact the Court *ex parte* to set a
17 hearing date for its motion on a regular twenty-eight (28) day hearing schedule, knowing full well
18 this meant the matter would not be heard by the Court until long after the crucial claim
19 construction discovery deadlines passed. *See* Marton Decl., ¶ 7.

20 The next morning, upon learning of this, Ambu’s counsel immediately contacted LMA’s
21 counsel to propose solutions to avoid any prejudice to Ambu’s ability to take claim construction
22 discovery that may be allowed by the Court. Marton Decl., ¶¶ 7-8. In particular, Ambu proposed
23 either a shortened briefing and hearing schedule for a motion to compel by Ambu, or alternatively
24 such a schedule for LMA’s Motion for Protective Order. After several telephonic and e-mail
25 exchanges, throughout which LMA indicated it might be amenable to an expedited schedule,
26 LMA indicated in an e-mail after the close of business on October 29, 2008, and after it filed its
27 Motion for Protective Order Re: Ambu’s 30(b)(6) Notice of Deposition of LMA (Dkt. No. 96)
28 (hereinafter “Motion for Protective Order”), that it was declining Ambu’s proposed shortened

1 briefing schedules, and that although it would agree to a modified briefing schedule, it would not
2 agree to any expedited hearing date at all, thereby defeating the purpose of any shortened briefing
3 schedule. Marton Decl., ¶¶ 9-10. In waiting until a week before the noticed 30(b)(6) deposition
4 to confirm their refusal to produce a 30(b)(6) witness, and then to file its Motion for Protective
5 Order to be heard on a regular hearing schedule, LMA is attempting to circumvent the need for
6 the Court to decide the matter and to unilaterally effect the relief they are seeking – to avoid
7 providing a witness for a the 30(b)(6) deposition of LMA on claim construction topics.

8 Ambu seeks this shortened schedule because it will be prejudiced unless the issue is
9 resolved in a timely manner such that Ambu may take any allowed discovery within the schedule
10 set by the Court. Pursuant to the Court's June 12 Scheduling Order, opening claim construction
11 briefs are due by November 25, 2008. Thus Ambu will suffer prejudice in not being able to make
12 use of any allowed discovery unless the resolution of LMA's Motion for Protective Order occurs
13 sufficiently in advance of the November 25, 2008, deadline in order for Ambu to have the
14 opportunity to take the 30(b)(6) deposition in time to incorporate any relevant discovery from it
15 into their opening claim construction briefs. A hearing date set pursuant to Civil L.R. 7.1.e.1 on
16 the usual twenty-eight (28) day schedule would occur after the deadline for Ambu to file its
17 opening claim construction brief. Thus, according to a regularly scheduled hearing date, if Ambu
18 were to prevail on the Motion to Compel it will file on October 31, 2008, it would not be in time
19 for Ambu to take LMA's 30(b)(6) deposition and incorporate relevant discovered information in
20 its opening claim construction briefing.

21 Furthermore, the Court's June 12 Scheduling Order sets the deadline for completion of
22 claim construction discovery for November 7, 2008. Accordingly, in order for Ambu to take any
23 allowed discovery, Ambu's Motion to Compel must be resolved either in time for Ambu to take
24 the deposition before the current November 7, 2008 deadline, or it is necessary for the Court to
25 reset this deadline so that Ambu may take any allowed discovery of LMA, upon resolution of
26 Ambu's Motion to Compel, without violating the Court's June 12 Scheduling Order.

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1 Thus, Ambu proposes the following alternative briefing and hearing schedules:

Event	Hearing Before Nov. 7 Claim Construction Discovery Cutoff	Hearing After Nov. 7 Claim Construction Discovery Cutoff
Ambu's Opening Brief	October 31, 2008	October 31, 2008
LMA's Opposition Brief	November 3, 2008	November 6, 2008
Ambu's Reply Brief	November 4, 2008	November 10, 2008
Telephonic Hearing	November 5, 2008	November 14, 2008

8 If the Court adopts a schedule where the hearing takes place after the currently set
9 November 7, 2008 claim construction discovery cutoff, Ambu further requests that the Court reset
10 that deadline to November 21, 2008, in order for Ambu to take any discovery allowed by the
11 Court in resolving Ambu's Motion to Compel.

12 Also, due to the shortened schedule, and for the sake of efficiency, Ambu requests that the
13 hearing be held by telephonic conference call.

14 A proposed Order granting the requested expedited schedule is being concurrently
15 submitted with this motion.

16 Dated: October 30, 2008

FENWICK & WEST LLP

18 By: /s/ C. J. Alice Chuang
19 C. J. Alice Chuang

20 Attorneys for Defendants
21 AMBU A/S, AMBU INC., AMBU LTD., and
AMBUDN. BHD.

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2008, I caused the foregoing DEFENDANTS' EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR BRIEFING AND HEARING ON DEFENDANTS' MOTION TO COMPEL to be electronically filed with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the applicable registered filing users.

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Dated: October 30, 2008

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